BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD GREEN and EMILY GREEN,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2012-092

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was The Law Office of Bill Kloos, PC.

David J. Hunnicutt, King City, filed the response brief and argued on behalf of respondent. With him on the brief were Lynn R. Stafford and Oregonians in Action Legal Center.

HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member, participated in the decision.

AFFIRMED 04/09/2013

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners' decision approving amendments of a previously issued conditional use permit for a home occupation located on property zoned for exclusive farm use (EFU).

FACTS

As explained in more detail below, Chuck Hester and Sandy Hester (the Hesters) lease their six-acre EFU-zoned site for events. A 2003 conditional use permit (2003 CUP) authorized the Hesters to use their property for weddings, receptions, reunions and anniversary celebrations pursuant to state and local laws that authorize home occupations. Under the 2003 CUP, the Hesters were limited to one event per weekend, and events were to last no later than 9:00 p.m. A 2010 Amendment to the 2003 CUP (2010 CUP) authorized additional events (bridal showers, luncheons, teas, business meetings, birthday parties, and memorial services) on one weekday and one weekend day per week. Together the 2003 CUP and 2010 CUP authorize a total of no more than three events weekly. Both the events authorized by the 2003 CUP and the events authorized by the 2010 CUP are required to be conducted substantially within a bridal cottage, gazebo, pavilion and catering building, but nothing in the 2003 CUP or the 2010 CUP prohibited those events from being conducted in part outdoors. Independent contractors and caterers are employed to staff the events.

In *Green v. Douglas County*, 63 Or LUBA 200 (2011) (*Green I*) LUBA remanded the 2010 CUP decision. In *Green v. Douglas County*, 245 Or App 430, 263 P3d 355 (2011) (*Green II*), the Court of Appeals reversed and remanded LUBA's decision in part. In an unpublished decision LUBA modified its *Green I* decision and remanded the county's decision for further proceedings in accordance with *Green I* as modified by *Green II*. *Green v. Douglas County* (LUBA No. 2010-106, November 23, 2011). Under *Green I* as modified by *Green II*, the county was required to determine whether the events authorized by the 2010

CUP would (1) be conducted "substantially" within buildings on the property as required by ORS 215.448(1)(c) and local law, and (2) employ on the site no more than five persons, as required by ORS 215.448(1)(b). Under *Green I* as modified by *Green II*, the county was also required to determine whether the Douglas County Land Use and Development Ordinance (LUDO) requires that past violations of local law must be rectified as part of the 2010 CUP. The decision that is before us in this appeal is the planning commission's decision addressing those issues.

While the appealed decision was adopted by the planning commission, the board of commissioners in declining to review the planning commission's decision on remand "affirmed" the planning commission's decision and adopted the planning commission's decision "as [its] own." Remand Record 3. Therefore any interpretations of local law in the planning commission's decision are entitled to the deferential standard of review that is required under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 266, 243 P3d 776 (2010). *Green II*, 245 Or App 437-8. The legal issues presented in the first and second assignments of error are primarily issues of statutory construction, and therefore the planning commission's interpretations are not entitled to *Siporen* deference under those assignments of error, simply because the LUDO includes language that implements the statute. *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992); *Kenagy v. Benton County*, 115 Or App 131, 134, 838 P2d 1076 (1992). The third assignment of error does concern purely local law, and therefore the planning commission's interpretation of the relevant local law is entitled to deference under *Siporen*.

FIRST ASSIGNMENT OF ERROR

The first and second assignments of error concern ORS 215.448, which authorizes home occupations in all zoning districts.[1] The issue presented in the first assignment of error

[1] ORS 215.448(1) is the relevant part of the statute for purposes of this appeal and is set out below:

is whether the planning commission's decision on remand adequately establishes that the events authorized by the 2010 CUP will "be operated substantially in" "buildings," as required by ORS 215.448(1)(c). *See* n 1. In this case those buildings include a bridal cottage, gazebo, 40-foot by 100-foot pavilion and a 12-foot by 22-foot catering building.[2] As an initial point of clarification, we noted in *Green I* that although the parties dispute whether the weddings, receptions, reunions and anniversary celebrations that were authorized by the 2003 CUP have been operated substantially in buildings in the past or can be expected to do so in the future, as required by ORS 215.448(1)(c), that issue was not presented in the *Green I* appeal of the 2010 CUP. We did not consider the parties' dispute about the events authorized by the 2003 CUP in *Green I*; and we do not consider that dispute here.

Our consideration of ORS 215.448(1)(c) under the first assignment of error in this appeal is limited to whether the planning commission adequately demonstrated that the bridal showers, luncheons, teas, business meetings, birthday parties, and memorial services that are authorized by the 2010 CUP will be operated substantially in buildings, as ORS 215.448(1)(c) requires.

> "The governing body of a county or its designate may allow, subject to the approval of the governing body or its designate, the establishment of a home occupation *and the parking of vehicles* in any zone. However, in an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses, the following standards apply to the home occupation:
>
> "(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;
>
> "(b) It shall employ on the site no more than five full-time or part-time persons;
>
> "(c) It shall be operated substantially in:
>
> (A) The dwelling; or
>
> (B) Other buildings normally associated with uses permitted in the zone in which the property is located[.]"

[2] As we explained in *Green I*, the pavilion is a large open sided building that is used for receptions and other purposes.

In our decision in *Green I*, we discussed the evolution of the current ORS 215.448(1)(c) text, by reviewing cases that interpreted prior versions of the statute and legislative changes that were adopted in response to those cases, which resulted in the current "substantially * * * in buildings" language in ORS 215.448(1)(c). *Green I*, 63 Or LUBA at 216-22. We ultimately concluded as follows:

> "[W]e think the legislature most likely intended 'substantially' to mean that the home occupation must be conducted in the dwelling or buildings 'to a large degree,' 'in the main,' or as the 'main part,' compared to the portion that is conducted outside the dwelling or buildings. In other words, as expressed in adverbial form, the home occupation must be 'largely' or 'mainly' conducted in the dwelling or building. * * *" 63 Or LUBA at 221.

Applying that understanding of the "substantially" requirement in *Green I*, we concluded the county had not demonstrated that the events authorized by the 2010 CUP would be operated substantially inside buildings:

> "* * * Based on the record in this appeal, little is known regarding how the events authorized by the 2010 CUP will be carried out and the 2010 CUP * * * imposes no limits on where events may occur on the site and does not require that any part of an event be held inside the buildings on the property. During nice weather, for example, there is simply no reason to believe that the birthday parties, memorials or luncheons authorized by the 2010 CUP * * * will be conducted 'substantially' in the pavilion or any other building on the property * * *. Stated differently, there is every reason to believe that during good weather such events will be conducted almost entirely outside buildings, with at most only food and drink preparation occurring in buildings. If that occurs, and there is nothing in the 2010 CUP * * * to prevent it from occurring, those birthday parties, memorials or luncheons will not be 'operated substantially in [t]he dwelling or [o]ther buildings' as required by ORS 215.448(1)(c), under any definition of that term.
>
> "To summarize our resolution of this portion of the first assignment of error, the home occupation events authorized by the 2010 CUP * * * must be 'operated substantially in [t]he dwelling or [o]ther buildings' as required by ORS 215.448(1)(c). To satisfy that statutory requirement, the events must be carried out in 'large part,' 'in the main,' or as the 'main part' in the dwelling or buildings, compared to the portion that is conducted outside the dwelling or buildings. It is possible that the events authorized by the 2010 CUP could meet that standard, * * * but only if conditioned to limit the extent of uses that occur outside qualifying buildings. The 2010 CUP decision does not include

> any such conditions and, as it stands, the authorized events could be carried out almost entirely outside buildings in the grassy area that is set aside for such events. For that reason alone the 2010 CUP * * * authorizes a home occupation that does not comply with ORS 215.448(1)(c)." *Green I*, 63 Or LUBA at 222.

On remand the planning commission found that the events authorized by the 2010 CUP would be carried out substantially within the buildings on the property as required by our decision in *Green* I. The planning commission relied in part on an affidavit submitted by applicant Sandy Hester that described the proposed events and took the position that 80-90 percent of each event would be inside buildings.[3] The planning commission also relied on a planning staff memo that explained that the events authorized by the 2010 CUP would be mostly carried out in the pavilion and catering building.[4]

---

[3] In that affidavit, Ms Hester explained:

> "Although the use of our home occupation has some outdoor components, the essential activities – receptions and various preparation services – are conducted within the structures. Ceremonies are usually conducted in and by the gazebo and typically last between 20 and 30 minutes. But the vast amount of the time for an event is devoted to the preparation for the event, which is located within the bridal cottage, the pavilion and the catering building, with the reception taking place in the pavilion. On rainy days, the covered areas are used for all functions, on sunny days, the covered areas offer relief from the heat and are the most popular locations.
>
> "* * * I estimate that 80-90% of the activities associated with the home occupation are held within the buildings. * * *." Remand Record 281.

[4] Planning staff explained:

> "The types of events authorized by the [2010 CUP] are relatively private in nature, inherently small-scale and lend themselves to being conducted or carried out almost entirely, but certainly at least, 'in the main,' 'in large part' or 'as the main part' in the qualifying buildings. Bridal showers may or may not have a need for the catering building and would likely be within the pavilion although some of these types of events may be small enough to be within the gazebo if it were a small bridal shower. A luncheon would utilize the catering building and, depending on the size of the event, could be conducted within the gazebo, or if too big for the gazebo, within the pavilion. A tea would also utilize the catering building and be located within either the gazebo or the pavilion. The same would hold true for a business meeting. A memorial service would more than likely be within the pavilion and may or may not utilize the catering buildings depending on the type of service. A birthday party would be within the gazebo or pavilion, again depending on size, but likely would not need to utilize the catering building since birthday parties typically do not have a catered meal, rather cake and ice cream is served to the attendees." Remand Record 205.

Petitioners complain that the alleged facts in the Hester affidavit and staff memorandum are not new and simply repeat the position that the applicants took in *Green I*. Even if petitioners are correct that the factual allegations that were presented following remand are not new evidence, the planning commission neither acknowledged nor discussed the facts alleged in the Hester affidavit and planning staff memo in its decision in *Green I,* whereas in its decision on remand it did. As the planning commission noted in its decision, the county's obligation in addressing ORS 215.448(1)(c) is complicated by the fact that the events authorized by the 2010 CUP have not yet occurred. Given that the disputed events have yet to occur, we conclude that a reasonable decision maker could have relied on the Hester affidavit and staff report to conclude that those future events will occur substantially within buildings.

The real issue, and likely the real source of dispute between petitioners and the Hesters, is the likelihood that some events will be conducted at least in part outdoors when the weather permits. Petitioners contend that outdoor activity will be significant. Neither the Hester affidavit nor the planning staff memo addresses how the outdoor portion of the future events will be prevented from becoming so significant that the events could no longer be characterized as being substantially inside buildings. Presumably to address this continuing point of contention between the parties, the board of commissioners imposed the following condition of approval:

> "5. The events conducted in conjunction with the Major Amendment must occur substantially in the qualifying buildings (i.e. the pavilion, gazebo, and catering building) and not more than 20% of any single event shall occur outside of the qualifying buildings." Remand Record 10.

Citing *Multnomah County v. City of Fairview*, 17 Or LUBA 305, 314 (1988); *aff'd* 96 Or App 14, 771 P2d 289, *rev dismissed* 308 Or 467, 781 P2d 1213 (1989); *Vizina v. Douglas County*, 16 Or LUBA 936, 942 (1988); and *Moore v. Clackamas County*, 7 Or LUBA 106,

113 (1982), petitioners contend the county erred by simply restating the approval standard as a condition of approval. Petition for Review 16. All of those cases stand for the proposition that a local government generally may not fail to adopt findings addressing a relevant approval criterion and then attempt to excuse or cure that failure by imposing a condition of approval that the approval criterion must be satisfied.[5] But that is not what happened here. First, the planning commission does find, based on the Hester affidavit and the planning department memo, that the events authorized by the 2010 CUP will be conducted substantially in buildings. Second, while the condition of approval does initially repeat the "substantially" standard, it goes further and requires that no more than 20 percent of any event may occur outside a building. While that refinement of the statutory substantially standard is not a great deal more objective than the statutory standard, it is not the same as the statutory standard. We agree with the county that if no more than 20 percent of each event authorized by the 2010 CUP occurs outside a building, the ORS 215.488(1)(c) "substantially" standard will be satisfied. *See Green I*, 63 Or LUBA 218-21 (discussing the cases that led to adoption of the "substantially" standard).

As far as we can tell, there is no dispute that 80 percent or even 100 percent of each event authorized by the 2010 CUP *could* occur inside buildings. Petitioners' concern appears to be, based on past events under the 2003 CUP, that more than 20 percent of the future events will occur outside buildings and without better findings there may be difficulties in determining how to analyze each event in the future to determine if the 20 percent standard is being met. Stated differently, we understand petitioners to contend that they and the Hesters

[5] We say substituting a condition of approval for findings addressing an approval criterion is *generally* not acceptable because the nature of the approval criterion, *i.e.*, whether it is objective and easily verifiable or subjective and more discretionary in application, may have a bearing on the permissibility of such a condition of approval. For example a failure to adopt findings addressing a proposed building's encroachment into a five-foot setback likely would not require remand if the approval was subjected to a condition that the proposed building be set back an additional distance to comply with the five-foot setback.

have somewhat different ideas about how to analyze the authorized events to determine if they are operating substantially (or at least 80 percent) within buildings. The Hesters seem to emphasize time spent inside preparing and cleaning up after events; petitioners' emphasis is on the scope and impact of outside activity during nice weather.

While the county might have saved the Hesters, petitioners and itself a great deal of trouble in the future by more directly addressing how particular events are to be analyzed for purposes of complying with the 20 percent condition, such precision in land use decision making and conditions of approval is the exception rather than the rule, and we do not agree with petitioners that such precision is legally required to approve the 2010 CUP. If petitioners and the Hesters do not agree that future events comply with the 20 percent condition, that disagreement may be resolved in an appropriate enforcement action or petition for an enforcement action.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The second assignment of error concerns ORS 215.448(1), which was set out in relevant part earlier at n 1. For ease of reference, ORS 215.448(1)(a) and (b) are set out again below:

> "The governing body of a county or its designate may allow, subject to the approval of the governing body or its designate, the establishment of a home occupation and the parking of vehicles in any zone. However, in an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses, the following standards apply to the home occupation:
>
> "(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;
>
> "(b) It shall employ on the site no more than five full-time or part-time persons[.]"

A. The ORS 215.448(1)(a) Requirement That Home Occupations in EFU Zones Must be Operated by a Resident or Employee of a Resident

ORS 215.448(1)(a) requires that a home occupation business in an EFU zone "shall be operated by a *resident or employee of a resident of the property* on which the business is located." (Emphasis added). The county initially failed to recognize the potential significance of ORS 215.448(1)(a) in *Green I*, and focused instead on ORS 215.448(1)(b). As a result, the county's application of ORS 215.488(1) in this case has probably become a great deal more complicated than it needed to be. It is undisputed that the Hesters are the only residents of the subject property. The Hesters' purported EFU zone home occupation is not operated by "a resident" and is not operated by "employee[s] of the resident." Rather, it is leased to others for the authorized events and those lessees contract with other persons (who are not Hester employees) to conduct the events. The Hesters' purported home occupation therefore would appear to be prohibited by ORS 215.488(1)(a), without regard to whether it violates the ORS 215.488(1)(b) "no more than five full time or part-time persons" requirement. As we explained in *Green I*:

> "* * *The parties in this appeal seem to agree that the 2010 CUP Amendment authorizes events at the site and authorizes persons who lease the site for events to engage contractors and others to put on the events authorized by the 2010 CUP Amendment. We therefore assume that it does. The parties also seem to agree that the 2010 CUP allows use of more than five persons to carry out events on the site. We therefore assume that it does.
>
> "* * * * *
>
> "* * * [The Hesters] are the residents and as far as we are informed they have not operated and will not operate the event-site home occupation, and [the Hesters] have no employees and do not intend to hire employees to produce events on the site. Assuming as we do that the 2010 CUP permits [the Hesters'] home occupation to operate in that manner, it would appear to violate the ORS 215.448(1)(a) requirement that [the Hesters'] event-site home occupation must be operated by [the Hesters] and their employees. However, petitioners do not assign error under ORS 215.448(1)(a). We therefore do not consider that question and turn to the five 'person' limit in ORS 215.448(1)(b)." 63 Or LUBA at 223-24.

Our conclusion that no issue had been raised in *Green I* regarding whether the home occupation event authorized by the 2010 CUP violates ORS 215.448(1)(a) was not disturbed by the Court of Appeals in *Green II*.

B. The ORS 215.488(1)(b) Requirement That Home Occupations in EFU Zones Must Employ on the Site no More Than Five Full-Time or Part-Time Persons

In answer to petitioners' contentions in *Green I* that allowing more than five persons to be employed to carry out the events authorized by the 2010 CUP violates ORS 215.488(1)(b), the county took the position that "the persons so employed are 'agents of the persons letting the facility' rather than [the Hesters'] employees." *Green I*, 63 Or LUBA at 224. We rejected that argument:

> "We agree with petitioners that as ORS 215.448(1)(b) is worded, its five person limit is not so easily avoided. The 'it' in ORS 215.448(1)(b) is [the Hesters] event-site home occupation. Under ORS 215.448(1)(b), that event-site home occupation may not 'employ' more than 'five * * * persons.' [The Hesters'] event-site home occupation 'employs' the persons who are required to produce events on the site, within the meaning of ORS 215.448(1)(b), whether they are [the Hesters'] employees or independent contractors or whether they are the employees or independent contractors of the attendees of the events. In either case the event-site home occupation employs those persons to produce the event." *Green I*, 63 Or LUBA at 224-25 (footnote omitted).[6]

Our conclusion set out above, similarly was not affected by the Court of Appeals' decision in *Green II*. Under our interpretation and application of ORS 215.448(1)(b), whatever the persons who come onto the site to execute the authorized events are called, for

---

[6] In the omitted footnote, we set out the following definition of "employ:"

> "**1a** : to make use of * * * **b :** to use or occupy (as time) advantageously * * * **c :** to use or engage the services of * * * ; also : to provide with a job that pays wages or a salary or with a means of earning a living * * * **d :** to devote to or direct toward a particular activity or person * * * e : OCCUPY * * *." *Webster's Third New Int'l Dictionary* 743 (unabridged ed 1981).

purposes of ORS 215.448(1)(b), they are "full-time or part-time persons" who are "employ[ed]" by the Hesters.

C. The County's Response on Remand

In one respect, ORS 215.448(1)(b) appears to be unambiguous. Under, ORS 215.448(1)(b) it would appear that a home occupation in an EFU zone could employ an unlimited number of full-time and part-time persons, so long as those persons are employed off-site rather than "on the site." The ambiguity in ORS 215.448(1)(b) concerns persons who are employed on the site, and more specifically the ambiguity in ORS 215.448(1)(b) is limited to determining how to count persons who are employed part-time on the site, since any employee who is employed full-time on the site would clearly count as one of the five persons permitted by ORS 215.448(1)(b).

The planning commission interpreted ORS 215.448(1)(b) to limit the number of persons who are employed on site *at any point in time*. In the decision on review, the county imposed the following condition of approval to ensure the events authorized by the 2010 CUP do not violate the planning commission's understanding of ORS 215.448(1)(b):

> "The events conducted in conjunction with the [2010 CUP] shall not employ more than five (5) full or part-time employees on the site at any given time." Remand Record 10.

Under the planning commission's interpretation, more than five different persons could be employed on the site, so long as no more than five persons are employed on the site at the same time.

Petitioners contend ORS 215.448(1)(b) limits the number of persons who are employed on the site, whether they are employed on the site "full-time or part-time." Under petitioners' interpretation of ORS 215.448(1)(b) a person who is employed on the site for one hour would count as one of the five persons ORS 215.448(1)(b) permits the home occupation to employ on the site, and any part-time person who was employed on site for one hour that

day after the first person left would count as another of the five persons ORS 215.488(1)(b) permits. Petitioners offer a colorful "five orange jump suit" description of the county's interpretation and a "take a check" description for the county's and their interpretations.[7]

Both petitioners' interpretation and the planning commission's interpretation is possible, because ORS 215.448(1)(b) does not specify the period of time that the five person limit is to be applied. And therefore both petitioners' and the county's interpretation can be criticized as adding to the statute the underlined language below:

> "It shall employ on the site no more than five full-time or part-time persons <u>each day</u>." Petitioners' Interpretation.

> "It shall employ on the site no more than five full-time or part-time persons <u>at any one time</u>." The Planning Commission's Interpretation.

We doubt the legislature envisioned home occupations like the one at issue in this appeal. We also doubt the legislature considered the possibility that home occupations would employ potentially large numbers of persons who would shuttle onto and off of the site. The legislature likely intended the five person limit to apply at any given point in time (the planning commission's position) or per day (petitioners' position), as opposed to per week, per month or per year. But the statute is simply silent about the period of time that the five person limit is applied to. Although it is a reasonably close call, we conclude the planning

---

[7] Petitioners explain:

> "* * * It is as if there are five orange jump suits at the [site] driveway, each with a number '1' through '5.' Anyone, according to the County, including the applicants, who comes onto the site to work on an event must put on one of the jump suits, and then leave it at the end of the driveway when he or she leaves. No more than five jumpsuits can be in use at any given time. A hundred persons, employed by a range of businesses, may be essential to and contribute to a single event, but the use is allowed if no more than five are on the site at any moment." Petition for Review 20-21.

> "There is no need for five orange jump suits at the throat of the driveway. Instead what is needed is a Take-A-Check dispenser. Each person who visits the site in support of an event takes a check with a number. If the machine is empty, the worker goes home; he does not wait. There are only five stubs to take from the machine." Petition for Review 22.

commission's interpretation is at least as consistent with the language of ORS 215.488(1)(b) as petitioners'. Under the planning commission's interpretation all that is required is to count the number of persons who are employed on the site at any given time. In our view, that interpretation requires less embellishment of the statute than petitioners' interpretation.

Finally, petitioners advance two more arguments under the second assignment of error. First, petitioners contend the Hesters must be employed in the disputed home occupation for it to qualify as an EFU-zone home occupation. Petitioners did not raise that issue in *Green I* and may not raise that issue for the first time in this appeal of the planning commission's decision on remand. Second, petitioners argue the planning commission's interpretation of ORS 215.448(1)(b) is inconsistent with *Green I* and *II* and is therefore precluded by *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992). We reject the argument. Whether the five-person limit imposed by ORS 215.448(1)(b) is measured at any point in time, or daily, or over some other period of time was not an issue in *Green I* and *Green II*. In those cases the issue was whether the ORS 215.448(1)(b) five person limit applied at all to the persons who are hired by the Hester's lessees to produce the events. The issue is properly presented in this appeal, and there is nothing in *Green I* or *Green II* that is inconsistent with the county's resolution of that issue on remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners' third assignment of error concerns LUDO 1.040.2, which provides as follows:

> "A development shall be approved by the Director or other Approving Authority according to the provisions of this ordinance. The Director shall not approve a development or use of land that has been previously divided or otherwise developed in violation of this ordinance, regardless of whether the applicant created the violation, unless the violation can be rectified as part of a development proposal."

In *Green I*, petitioners contended that the Hesters have violated the terms of their 2003 CUP many times over the years and that LUDO 1.040.2 requires that the Hesters rectify those past violations as part of the 2010 CUP approval. In *Green I* LUBA found the planning commission implicitly interpreted LUDO 1.040.2 to require a completed enforcement action before the rectification obligation imposed by LUDO 1.040.2 is implicated:

> "* * * We understand the planning commission to have interpreted LUDO 1.040.2 to require more than petitioners' allegations and presentation of evidence that intervenors current event-site home occupation may violate the LUDO or the 2003 CUP. We understand the planning commission to have implicitly interpreted LUDO 1.040.2 to require a completed enforcement action that concludes that intervenors event-site home occupation is in violation of the LUDO or 2003 CUP. While the planning commission's interpretation is not entitled to any deference under ORS 197.829(1), we cannot say that interpretation is erroneous. ORS 197.835(9)(a)(D)." *Green I*, 63 Or LUBA 200, 211-12 (footnote omitted).

The Court of Appeals did not agree that the planning commission had adopted a reviewable interpretation of LUDO 1.040.2 and reversed that aspect of LUBA's decision. *Green II*, 245 Or App 439-41. The Court of Appeals concluded the planning commission's decision must be remanded for the county to adopt a reviewable interpretation of LUDO 1.040.2 and, depending on the nature of that interpretation, to apply LUDO 1.040.2. *Id.* at 441.

On remand, the planning commission adopted the following interpretation of LUDO 1.040.2:[8]

> "* * * In the pending matter, the [Planning] Commission notes that at the time of application, County Staff reviewed the subject property and found that there were no code violations on the subject property, and no active or filed violations complaints.
>
> "During the course of the original proceedings of this application, County Staff received complaints of code violations on the subject property. Those complaints were investigated, reviewed, and evaluated by the County

[8] As we have already noted, the board of commissioners adopted the planning commission's decision as its own and therefore the planning commission's interpretation is entitled to deference under ORS 197.829(1) and *Siporen v. City of Medford*.

> enforcement officer, and found to be without merit. Had the County enforcement officer found that the code violations were meritorious, LUDO § 1.040.2 would have become applicable, and Applicants would have had to resolve the code violations before the subject application could be approved.
>
> "In summary, the [Planning] Commission interprets LUDO § 1.040.2 as being applicable to a pending land use application only if there is a finding by the County, either as part of its own investigation or in response to an investigation instigated as a result of a third party complaint, that the property which is the subject of the pending application is being used in violation of the LUDO, or was previously divided in violation of the LUDO. *Until the County makes this finding, LUDO § 1.040.2 is not an approval criterion for a land use application*. * * *" Remand Record 7 (emphasis added).

The planning commission also adopted as its own, the interpretation included in a planning department memo. The planning department memo appears to be an attempt to explain how possible existing violations of the LUDO regarding property that is subject to a pre-application conference or a pending permit application are handled by the planning department under LUDO 1.040.2. The memo explains that if a possible violation is identified during the pre-application conference that precedes a permit application, "it is evaluated by the enforcement officer." Remand Record 108. Similarly, if a LUDO violation is alleged while a permit application review is pending, which is what happened in this case, the alleged violation is evaluated by the county enforcement officer.

> "* * * In reviewing applications, if a violation complaint is filed on a pending application, the complaint is investigated and evaluated by the enforcement officer and the validity of the complaint and/or condition compliance verified. If the complaint is unfounded, the pending application continues through the planning process. If a violation complaint filed on a pending application is found to have grounds, the violation must be resolved before the pending application can be approved, unless the violation can be resolved as part of the pending application. If a violation is not resolvable the application cannot be approved.
>
> "*Compliance review on violation complaints made during an active application review is discretionary and appeals on enforcement actions are to Circuit Court. Complaints are evaluated by staff and if potentially valid forwarded to the enforcement officer. The enforcement officer and enforcement program have specific procedures used in review of complaints."* Remand Record 109 (emphasis added).

Although the planning department memo does not specifically cite LUDO Article 52, that is the Article of the LUDO that governs "Administration and Enforcement," and sets out procedures for the county to take action with regard to violations of the LUDO.[9] Under LUDO 3.52.425(1), the planning director is authorized to designate planning department employees as "enforcement officers." LUDO 3.52.425(4) directs that "[v]iolation proceedings shall follow the process set forth in ORS 153.005 to 153.145." ORS 153.048 and 153.058 authorize the county and private parties to initiate violation proceedings. LUDO 3.52.125 provides that "[t]he Circuit Court for the State of Oregon for the County of Douglas has jurisdiction over any and all violations of this ordinance."

In this case, following petitioners' July 7, 2010 complaint, the planning commission found that a county enforcement officer determined on October 4, 2011 that petitioners' complaints were "without merit." Remand Record 8, 143. Although the memorandum that appears at Remand Record 143 that concludes there is no violation on the property is signed by an "Environmental Inspection Specialist," we understand the planning commission to have found that the Environmental Inspection Specialist acted as an enforcement officer. Remand Record 7.

The above interpretation of LUDO 1.040.2 actually has two related parts. We address each of those parts separately below.

A. The First Part of the County's Interpretation

In the first part of its interpretation, the planning commission interprets the rectification obligation under LUDO 1.040.2 to be triggered in this case *only* if the county enforcement officer finds that there is a violation on the Hester's property.

[9] We noted some of the provisions of LUDO Article 52 in our decision in *Green I*. *Green I*, 63 Or LUBA 211.

The first part of the county's interpretation of LUDO 1.040.2 is at least similar to the interpretation we thought the county had adopted in *Green I*. We understand the county to have concluded that allegations of LUDO violations on property that arise prior to or after a permit application is submitted for that property are investigated by a county "enforcement officer." In this case we understand the planning commission to have found that petitioners' allegations were investigated by a county enforcement officer and found not to be meritorious. We also understand the planning commission to have found that a finding by a county enforcement officer that there are violations is a *prerequisite* for there to be any obligation to rectify violations under LUDO 1.040.2. In this case, the county concluded that because there was no such finding LUDO 1.040.2 simply does not apply.

Petitioners do not really challenge this part of the county's interpretation. But even if they did challenge the first part of the county's interpretation, there is nothing implausible about that part of the interpretation. There is nothing in the text of LUDO 1.040.2 that specifies *how* the county must go about determining whether there is a violation that must be rectified under LUDO 1.040.2. Because there is nothing implausible about the first part of the county's interpretation, we defer to that interpretation. *Siporen v. City of Medford*, 349 Or at 266.

B. The Second Part of the County's Interpretation

The first part of the county's interpretation of the LUDO does not really address the possibility that the enforcement officer's October 4, 2011 determination that there are no violations on the Hesters' property might be inadequate or incorrect. Petitioners contend the enforcement officer's October 4, 2011 determination is both inadequate and incorrect. We understand petitioners to contend, moreover, that the planning commission may not simply rely on the enforcement officer's October 4, 2011 determination as dispositive in this case under LUDO 1.040.2 and must instead consider the merits of petitioners' arguments that

there are un-rectified violations on the Hesters' property that under LUDO 1.040.2 must be rectified before the 2010 CUP Amendments may be approved. Petitioners argue:

> "[T]he enforcement matter should have migrated up the chain of command with each allegation of violation being examined under the law and facts [by the planning commission], with competent reviewable findings addressing each issue. That did not happen. Instead, all we have in the record is a couple of conclusory phrases resolving the alleged violations * * *." Petition for Review 30.

It is clear that the planning commission concluded that it was *not* obligated to consider the merits of petitioners' disagreement with the county enforcement officer, and that the circuit court has jurisdiction to resolve any such disagreement with the county enforcement officer's October 4, 2011 determination. "Compliance review on violation complaints made during an active application review is discretionary and appeals on enforcement actions are to Circuit Court." Remand Record 109.

The mechanics of how petitioners could have gone about challenging the enforcement officer's October 4, 2011 determination of no violation through a writ of review or through LUDO Article 52 and ORS 153.005 to 153.145 is not clear to us, and the county does not make any attempt to explain how petitioners would go about challenging the October 4, 2011 determination or seeking a different decision about the alleged violations on the Hesters' property. The county simply finds that the LUDO has procedures for taking action to enforce the LUDO.

We agree with petitioners that the enforcement officer's reasoning in rejecting their complaints in the October 14, 2011 determination is conclusory. Remand Record 143. But petitioners cite nothing in the language of LUDO 1.040.2 or elsewhere in the LUDO that supports their contention that the planning commission, not the circuit court, is the correct forum for petitioners to pursue their disagreement with the enforcement officer's October 4, 2011 determination. We do not agree that LUDO 1.040.2 or any other part of the LUDO cited by petitioners must be interpreted to require that the planning commission consider the

merits of petitioners' allegations of violations in this 2010 CUP Amendment proceeding under LUDO 1.040.2. As we noted earlier, LUDO 3.52.125 provides that "[t]he Circuit Court for the State of Oregon for the County of Douglas has jurisdiction over any and all violations of this ordinance." LUDO 3.52.125 is entirely consistent with the county's position that the circuit court has jurisdiction to consider any challenge of an enforcement officer's determination regarding violations under LUDO 1.040.2. Because there is nothing implausible about the second part of the county's interpretation, we defer to that part of the county's interpretation as well. *Siporen v. City of Medford*, 349 Or at 266.

The third assignment of error is denied.

The county's decision is affirmed.